



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION (BA) No.768 OF 2024

(Mohd. Aabid s/o. Mohd. Sadique Vs. State of Maharashtra, through PSO, PS
Mehkar, Tq. Mehkar, Distt. Buldhana)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.

Court's or Judge's orders.

Mr. A.J. Thakkar, Advocate for applicant.
Ms. T. Udeshi, APP for respondent.

CORAM : URMILA JOSHI-PHALKE, J.
DATE : 19th OCTOBER, 2024.

1. The applicant came to be arrested on 7.10.2023 in connection with Crime No.578 of 2023, registered with Police Station Mehkar, District Buldhana, for the offence punishable under Section 8(c) and 20(b)(ii)(c) and 25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, 'NDPS Act').

2. The crime is registered on the basis of report lodged on an allegations that on 6.10.2023 the informant PSI Sachin Kanade and other Police staff of Local Crime Branch, Buldhana were on patrolling duty within the jurisdiction of Mehkar town at that time PSI Shrikant Jindamwar received secret information that contraband is being transported on Samruddhi Highway, from Nagpur towards Mehkar by Truck No.MH-26-DE-0851. Therefore, after obtaining necessary permission from the higher authorities, informant, and other police staff along with Panchas reached at Exit Gate II in Sabra Shiwar. At about 10.05 hours, the raiding party noticed Truck No.MH-26-DE-0851 coming from Nagpur side and said truck was intercepted. Two persons were noticed in the said truck. Search of said Truck was taken.

During search, three travel bags and one sack was found on the ash. During search of said bags and sack, total 39 pockets containing in all 43 kg 200 gm contraband Ganja was recovered. Accordingly, raiding party seized the muddemal Ganja and taken those persons in custody. Thereafter, the informant reached to the Police Station and lodged report. On the basis of the report Police have registered the crime.

3. Heard Mr. A.J. Thakkar, learned counsel for the applicant, who submitted that there is no compliance under Section 42 as well as the applicant is arrested merely on suspicion. He submitted that there was no conscious possession of the present applicant as far as contraband articles are concerned. The applicant is behind bars since the date of his arrest. The procedure adopted for the seizure is also not according to Section 52-A of the NDPS Act. For all above reasons, the applicant be released on bail.

4. Learned A.P.P. strongly opposed the application on the ground that the commercial quantity contraband was seized from the said Truck wherein the applicant was found along with other co-accused. The samples were drawn at the time of seizure in presence of panchas and same were immediately sent to forensic laboratory for its analysis. The inventory report was also drawn. There is rigor under Section 37 of the NDPS Act and, therefore, the application deserves to be rejected.

5. Having heard learned counsel for the applicant and learned A.P.P. for the State. Perused the record available. The First Information Report shows that when the informant has received the secret information he immediately rushed to intercept the Truck along with raiding party members and in presence of the panchas. On interception of the Truck the

contraband article i.e. Ganja of 43 kg. and 200 gm. was seized in presence of panchas. During the investigation the statement of present applicant was also recorded under Section 67. As far the compliance under Section 42 of the NDPS Act which is mandatory is concerned it reveals that the person, who received the information has to immediately inform about the same to his superior.

6. Section 42 of the NDPS Act reads as under :

“42. Power of entry, search, seizure and arrest without warrant or authorisation.-- (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open

any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

1[Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that] if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section

(1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

7. It is vehemently submitted that Section 42 of the NDPS Act is not complied with and, therefore, the raid conducted was entirely vitiated. Twin requirements of Section

42(1) and 42(2) of the NDPS Act are; firstly, person conducting raid must be an empowered officer, superior to the rank of constable, and secondly, if raid was conducted between sunset and sunrise, the officer conducting such raid must report grounds of belief that if the raid was not so conducted, there would be chance of escape of offender and further that such recorded grounds for his belief shall be communicated to the superior officer within 72 hours.

8. In the context of these twin requirements, apparent conflict between two earlier judgments of the Hon'ble Apex Court was sought to be resolved in the case of **Karnal Singh vs. State of Haryana**, reported in **(2009)8 SCC 539**. The Constitution Bench of the Hon'ble Apex Court considered extent of mandatory nature of requirement of Section 42 of the NDPS Act and in what circumstances accused may not get benefits of mere non compliance unless it was established that he suffered prejudice due to such non compliance. After considering scope of Section 42 of the NDPS Act, the Bench concluded that although twin requirement of Section 42 of the NDPS Act requires to be complied with and total non-compliance of the same was impermissible, if there was some delay in compliance which could be explained satisfactorily by placing material on record, such compliance be acceptable.

9. Thus, if the aforesaid judgment is taken into consideration and facts of the present case show that while the informant was on Patrolling duty he received the secret information and he intercepted the Truck and the applicant was found along with the co-accused. The documents show that raid was conducted and superior officer was informed. Thus, there is adequate or substantial compliance of Section 42 of the NDPS

Act. Moreover, whether there is a complete compliance or not is a question of fact which can be decided in each case on the basis of facts and circumstances of the case.

10. Second limb of submissions was that there is no compliance of Section 52-A of the NDPS Act.

Section 51 contained in Chapter-V of the NDPS Act pertains to the procedure which deals with the procedure to be conducted while obtaining searches, seizures, arrests and the warrants which shows that unless there is anything contrary provided in the NDPS Act, in relation to all warrants issued and arrests, searches and seizures carried out by the Investigating Agency during the course of investigation, provisions of the Cr.P.C. could apply.

11. Admittedly the samples were not obtained and produced before the Magistrate, it is undoubtedly true that the Investigating Agency has not followed the procedure under Section 52-A of the NDPS Act, deeming fiction of photograph samples etc. being treated as primary evidence as provided under sub-section (4) of Section 52-A of the NDPS Act would not be available. Whether any mode otherwise in which the prosecution can establish a charge against the accused, though the prosecution has not followed provisions of Section 52-A of the NDPS Act and not drawn samples in presence of Magistrate, still the prosecution has followed procedure of obtaining samples in presence of independent witnesses i.e. panchas. Whether procedure followed by the investigating agency is sufficient to establish a charge against accused, is a matter of evidence.

12. At this stage, when the court is concerned with question of granting or refusing bail, the same cannot be the sole consideration. However, consideration should be viewed in the

light of rigor of Section 37 of the NDPS Act. In view of Section 37 of the NDPS Act, bail can be granted if court is satisfied i.e. applicant is not likely to commit offence while on bail and the bail can be granted if the court is satisfied that there are reasonable grounds for believing that applicant is not guilty of offence.

13. Thus, satisfaction contemplated regarding accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. Thus, recording of satisfaction on these aspect is sine quo non for grant of bail.

14. In the light of the above well settled legal position, there is sufficient material on record to hold that the applicant is involved in crime. In view of the rigor under Section 37 of the NDPS Act, I do not find merits in submissions of learned counsel for the applicant and there are reasons to believe that the applicant is guilty of said offences.

15. In this view of the matter, the application deserves to be rejected and the same is rejected.

16. The application stands disposed of

(Urmila Joshi-Phalke, J.)